DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: March 6, 2019 CASE NUMBER: 2018CV30597
Plaintiff: AURORA EDUCATION ASSOCIATION v. Defendant: ADAMS-ARAPAHOE SCHOOL DISTRICT 28J	▲ **COURT USE ONLY** ▲ Case Number: 2018CV30597 Div. 202
ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	

THIS MATTER comes before the Court on Defendant Adams-Arapahoe School District 28J (the "School District")'s motion for summary judgment dismissing Plaintiff Aurora Education Association (the "Association")'s complaint. The Court having considered the pleadings, file and applicable law finds, for the reasons set out more fully below, that the School District's motion is GRANTED.

INTRODUCTION

1. The Association, which represents approximately 2400 teachers filed a Complaint seeking injunctive relief against the School District for a purported "failure to obtain fully informed consent of the teachers" prior to submitting plans to become Innovation Zones pursuant to the Innovation Schools Act of 2008 (the "ISA"), Colorado Revised statutes, Article 32.5, of Title 22. Am. Cmpl.¶1.

2. The ISA requires that all proposed innovation plans include evidence that "a majority of teachers … consent to designation as an innovation school… [and] … consent to creating the school zone." C.R.S. §22-32.5-104(3)(f) and (4)(c).

3. The Association asserts that for the 2016-17 school year, the School District submitted innovation plans for four[1] schools: (a) Crawford Elementary ("**Crawford**")[2] (Am. Cmpl ¶ 17); (b) West Middle School ("**West**"); (c) Aurora Central High School ("**Central"**) and Paris Elementary ("**Paris**"),. Am. Cmpl. ¶10.

4. The Association concedes that a majority of teachers, at each of the named schools, consented to becoming innovation zone schools but argues that their consent was not *informed* because the School District "did not obtain their consent to the actual plans that were submitted to the state board of education." Am. Cmpl. ¶ 13.

Changes to IRS Plans

5. For its part, the School District concedes that some verbiage in the innovation plans submitted on behalf of three of the schools (Crawford, West and Central) is different from language in the plans voted on by the teachers but argues that the changes are minor and not material. Specifically, the changes for these three schools are as follows:

> **Crawford:** The plan voted on by teachers contained a description of how the school would address *Building the Capacity of Staff to Provide feedback and Data analysis – Building a cohorts' understanding of observation feedback and data driven instruction protocols.* Mtn, Ex.V.
>
> The plan submitted to the State Boards of Education **added** that the described actions would be "implemented with fidelity to the Relay model unless and until the districts augment or replace this system with a comparable program that is a better fit for the ACTION Zone." (Emphasis added) Mtn. Ex.J

[1] The Association has withdrawn any claims associated with Boston. Rsp to MSJ, p.3

[2] The Associations Complaint and Amended Complaint reference Columbine K-8 as a named school. However, the Amended Complaint describes plans at Crawford and the parties make reference to Crawford in the motion for summary judgment and response, therefore, the Court assumes that Crawford is the school at issue.

The Association asserts that the "Relay" program is "a controversial program involving very structured methods of observing and supervising teachers, and student management." Rsp. ¶58. The Association acknowledges that the plan voted on by teachers had a "place holder" under the section addressing "Expected Outcomes." Rsp. ¶43. Nevertheless, it argues that the omission of a reference to using the Relay program to achieve the goals set out in the plan is a material omission affecting the validity of the teacher consent to the innovation designation.

West: The plan voted on by teachers and the plan submitted to the Board contained language "granting the Office of Autonomous Schools oversight over schools in the innovation zone." Rply, p.9, Mtn. Ex. M, Ex.X.

The plan submitted to the Board **added** an additional reference to the Office of Autonomous Schools stating that "Both the Office of Autonomous Schools and the individual ACTION Zone schools will have significant roles in managing the performance of the schools and the Zone." Rply, p.10, Mtn, Ex.M.

The Association argues that the "plan at [West] did not inform staff of the extent to which [the School District]'s Office of Autonomous Schools would be involved in day-to-day administration of that school." Rsp. p. 14-15.

Central: The plan voted on by teachers at Central provided that

- School leadership … will determine the following year's school calendar …

- Staff will have an opportunity to consent to calendar changes prior to approval of the final calendar for the following school year …

- Pending calendar approval, ACHS reserves the right to require additional teacher duty days … but [Staff] must consent to the increase in work days through the calendar vote process.

The plan submitted to the Board of Education contained the above identical information but **deleted** the phrase "Pending calendar approval."

> The Association argues that the deletion of the phrase "pending calendar approval" was "misleading … because it added language about consent to teacher work days that was not included in the submission to the state board." Rsp. p.14.

6. As to the fourth school**, Paris,** the parties dispute whether there were any changes to the plan voted on by the teachers and the plan submitted to the Board of Education. The School district asserts that the plans were the same. Mtn, ¶24. The Association "disputes" this fact. Rsp. ¶24. It does not appear that either party can produce a copy of the plan that was voted on by the teachers.

7. The Association claims that references to the Relay program were added to the plan for Paris after it was voted on by the teachers. The Association relies on purported statements made by Paris' principal at the time, Tammy Stewart, to other principals in the School District, and the Assistant Principal at Paris, Shannon Blackard. Rsp. ¶24. The Association concedes that Blackard would testify that "Stewart had an unspecified discussion about Relay before the staff at Paris … voted." Rsp. ¶23. Additionally, Blackard, who was a teacher at the time of the vote states that "the plan she voted on is the same plan that was submitted to the … state Boards of Education." Mtn, p.16

8. The Association asserts that Ms. Blackard's statements about what Stewart said prior to the vote are "inadmissible hearsay." Rsp. ¶23. However, the Association also claims that statements purportedly made to other principals and Blackard wherein Ms. Stewart purportedly stated that unspecified changes to the plan occurred are "statements of an employee of a party-opponent." Rsp. ¶24.

9. Whatever else may be said about this issue, the Court will certainly not rule that the out-of-court statements of Ms. Stewart that are *unfavorable* to a party should be considered non-admissible hearsay but that the out-of-court statements of the same witness which are *favorable* to a party are admissible.

ISA requirements for teacher approval

10. In addition to arguing that any changes to the plans voted on by the teachers were minor and not material, the School District also argues that the ISA only requires a majority of teachers to consent to "designation as an innovative school" [or] "consent to creating the school zone" Mtn.p.14; *C.R.S. §22-32.5.104(3)(f) and (4)(c).* The School District asserts that the "statute does not require informed consent by teachers to every provision of the innovation plan." Mtn. p.14.

11. The Association counters that "consent" is meaningless if a party does not know what they are consenting to. Further, the Association points to the fact that a triennial review of innovation plans is required and allows the "local school board in collaboration with the innovation school" to "revise the innovation plan. … Any revision to the innovation plan shall require the consent of a majority of the teachers …" Rsp. p.13; *C.R.S. §22-32.5-110(1).* The Association makes a compelling argument that it would make little sense to mandate teacher consent to changes to a plan if no consent to the original plan is required.

Mootness

12. Both parties acknowledge that the ISA requires a review of innovation schools every three years and that all the schools at issue in this lawsuit "are in their third and final years of the initial innovation plan." Mtn. p.19. The Association

acknowledges this triennial review and further states that the Association "does not seek … any changes in the innovation plans in the current (2018-19) school year. It is too late in the school year for such relief to make practical sense." Rsp. p. 15. However, the Association argues that the School District has not committed to a teacher vote during the upcoming review, and therefore a valid case and controversy exists.

13. Additionally, the Association asserts that a Declaratory Judgment on the issue of whether or not consent means consent to specific language of an ISA plan and not simply a vote agreeing to designation as an innovative school, is an issue that remains subject to determination. The Association seeks a declaration as to "the parties' rights as to future events, as well as to those which have already occurred." Rsp. p. 15-16.

Additional Arguments for Summary Judgment

14. The School District urges summary judgment dismissing the Associations claims based on asserted "lack of standing" on the part of the Association, as there is "no evidence of any actual injury," because no teacher has stated that they were harmed by any alleged changes between the plans voted on and the plans submitted to the Board of Education. Mtn. p. 22.

15. Additionally, the School District seeks summary judgment in favor of its affirmative defenses of equitable estoppel and laches. Mtn. p. 20-22. The School District points to the fact that the lawsuit was filed nearly two years after the innovation plans were approved by the Board of Education and that "[f]or the past three years [the School District] has hired new teachers in accordance with the plans, received grant funds and implemented all the action items identified in the innovation plans." Mtn. p.22.

16. For its part, the Association asserts that it has standing to bring suit on behalf of its member teachers and that the "legally protected interest in this case is found in the requirement of teacher consent to innovation [plans] set forth in [the ISA]." Rsp. p.17. In this lawsuit, the Association is seeking a determination of what that "consent" requires. As to the equitable estoppel and laches defenses, the Association asserts that there are genuine issues of material fact on the question of whether there was an unreasonable delay in bringing this case as well as the extent of any detrimental reliance based on any such delay. These disputed material facts preclude summary judgment. Rsp. p. 16

LEGAL ANALYSIS

I. Mootness

"Mootness instructs courts not to grant relief that would have no practical effect upon an actual and existing controversy." *People v. Valdez, 405 P3d 413, 423 (Colo. App. 20017).*

> The duty of the court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to declare principles or rules of law which cannot affect the matter at issue before it. … An issue becomes moot when the relief granted by the court would not have a practical effect upon an existing controversy. *Anderson v. Applewood Water Assoc., Inc., 409 P3d 611, 617 (Colo. App. 2016)*

In this case, the Association concedes that it "does not seek … any changes in the innovation plans in the current (2018-19) school year. It is too late in the school year for such relief to make practical sense." Rsp. p. 15. Indeed it would seem impossible to issue a ruling that could reverse the effect of the implementation of the innovation plans at the four named schools. The Court could not simply require a new vote on the plans

as the parties stipulate that the teacher "turnover" during the last three years at each of the named schools ranges from 26.51% in the 2015-16 school year at West (Mtn ¶48, Rsp. ¶48) up to 75% teacher turnover in the 2017-2018 school year at Paris. (Mtn, ¶33, Rsp. ¶33).[3] Thus, any vote on the innovation plans by teachers presently working at the subject schools would not be reflective of what the original vote might have been. Additionally, it is undisputed that all the plans are presently subject to review and revision. Any revisions require a majority of the teachers presently working in the schools to agree to the changes. While a review does not necessarily mean that any changes will be proposed, one wonders that if the plans, as presently constituted, are working and the schools are succeeding by all measurable standards why any teacher would vote to change the plans. More likely, there will be some measurements of success and some places where changes would be proposed. Under this scenario the teachers consent to these changes is required by the applicable statutes.

It appears that what the Association is seeking from this lawsuit is not a "re-vote" on the plans being used at the four subject schools, but rather a declaration that when a majority of teachers consent to an innovation plan there will be no changes to the plan when it is presented to the various boards of education for approval. "The mootness doctrine … does not always bar judicial review of moot issues." *Anderson, Id. at 617*.

> Two exceptions to the mootness doctrine permit courts to consider the merits of an otherwise moot matter (1) when the matter involves an issue that is capable of repetition, yet evading review; or (2) when the matter involves a question of great public importance or recurring constitutional violation. *Anderson, Id. at 617*.

[3] The parties do not dispute that there has been significant teacher turnover at the schools for each of the three years that the respective innovation plans have been in place. Mtn ¶'s 33, 41 and 48 and Rsp. ¶33, 41 and 48.

In this case, the Association asserts that the issue of teacher consent to all terms of an innovation plan is capable of repetition. Indeed, it seems plausible that other schools within the School District could be considered for designation in an innovation zone and the process of obtaining majority consent could recur. The question then becomes whether such recurrence would *evade review*. The facts in *Anderson* give some guidance on how to consider this issue.

Anderson involved, in part, an appeal of a trial court's denial of a preliminary injunction to prevent a homeowners' association from submitting proposed amended covenants for a full membership vote. By the time of the appeal the full membership vote had already occurred. The Court of Appeals determined that the issue relating to submission of a change of covenants for a full member vote was moot. *Anderson, Id. at 614*. The appellants argued that the voting issue was "capable of repetition yet evading review." *Id.* The court determined the matter was moot even though "this issue may be capable of repetition in other cases and between other parties, the issue will not evade review because the 'result' of the vote … will be the subject of the action." *Id. at 617.*

Similar to the analysis in *Anderson*, if, in the future a school is proposing an innovation plan and a majority of teachers consent to specific language of a plan and the School District changes any of that language when it is presented to the approving authorities, the Association will have an opportunity to object at that time and raise the validity of any proposed plan. Thus, the issue of whether the School District must obtain the consent of a majority of teachers to specific language of a plan and is prohibited from changing any language in that plan is capable of repetition, but it is also subject to review and therefore the doctrine of mootness applies to this case. Further,

the "doctrine of ripeness [which] recognizes that courts will not consider uncertain or contingent future matters because the injury is speculative and may never occur" also applies to this case. *Save Cheyenne v. City of Colorado Springs, 425 P3d 1174, 1183 (Colo. App. 2018).* For all of these reasons the Court finds that the Associations claims for injunctive and/or declaratory relief are moot.

II. Materiality of the Changes in the Plans

Even if the Court were to conclude that the matter raised by the Association is not moot, the Court finds that the School District substantially complied with the requirements of the ISA when it obtained majority consent to the innovation plans despite some minor additions or deletions to the language of the plans as they were presented for Board approval.

First, a strict reading of the language of the ISA only requires consent to "designation as an innovation school" (§22-32.5-104(3)(f)) or "consent to creating the school zone," (§22-32.5-104(4)(c)). "In interpreting statutes, we endeavor to give effect to the intent of the General Assembly. To determine that intent, we begin with a statute's plain language. We apply the text as written, reading words in context and according them their ordinary meanings. [internal citations omitted] *Colorow Health Care, LLC v. Fisher, 420 P3d 259, 262 (Colo. 2018).* Neither of the sections requiring evidence of teacher consent makes any specific reference to the teachers approving (or consenting) to the innovation *plan.* However, the Court finds that such a strict reading of the statute would not promote the purpose of the statute, which is to obtain input from teachers, and others effected by a change of school programs and administration, prior to adopting such changes. Therefore, the Court finds that the ISA requires a majority of

teachers to vote on a proposed *plan* and will view the facts of this case and determine whether there was substantial compliance with the statute.

"[A]ll statutes demand compliance, but the term 'compliance' without further modification, connotes an element of degree. … Substantial compliance is less than absolute, but still requires a significant level of conformity." Colorow, Id. at 262. The Colorado Supreme Court in *Colorow* referenced a "three-factor test to determine whether substantial compliance is met" setting forth consideration of the following:

> (1) the extent of the party's noncompliance with the requirements;
>
> (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the party's non-compliance; and
>
> (3) whether it can reasonably be inferred that the party made a good faith effort to comply or whether the party's non-compliance is more properly viewed as the product of an intent to mislead. *Colorow, Id. at 266.*

Assuming that the statute requires a vote from teachers on an actual "innovation plan" as opposed to a vote on whether or not they agree to a "designation" as a innovative school the Court will consider whether any changes to the plans in the four subject schools constitutes a failure to substantially comply with the ISA.

CRAWFORD.

Plan Presented to Teachers: The plan voted on by the Crawford teachers set out in detail certain "data driven instruction protocols" the plan stated that "Crawford will train all the teacher leaders and others … in the 6 Step Process Observation Protocols … Additionally … teacher leaders and other staff … [will] be trained in the Data Driven

Instruction Protocol…" Mtn. Ex. V. The Association acknowledges that there was a "placeholder" under the "Expected Outcomes" section of the plan.

Plan Presented to Board: The only difference between the plan voted on by the Crawford teachers and the plan submitted to the Boards is the inclusion of language that the proposal will be "implemented with fidelity to the **Relay** model unless and until the districts augment or replace this system with a comparable program that is a better fit for the ACTION Zone." Mtn. Ex. J.

Association's Objection: The crux of the Association's objection is the inclusion of the "Relay model" as part of the plan.

Consideration of Substantial Compliance Factors: (1) The School District did not include reference to the use of the "Relay" program to implement its proposed plans for innovation. However, since the plan presented to the teachers had a "place holder" under the Expected Outcomes section it can be assumed that the teachers understood that the school would use some kind of leadership program, if not Relay then some other program, and therefore it would not be a surprise that a specific program was included in the final plan submitted to the Boards. (2) The plan voted on by the teachers set out the form of training and leadership procedures Crawford expected to implement, whether or not this was done pursuant to the Relay program or some other educational program is not a significant matter. (3) It cannot be inferred that failure to specifically identify the Relay program in the plan voted on by the teachers was an intentional act meant to mislead the teachers. For all of these reasons the Court would find that there was substantial compliance with the ISA when the teachers voted on a

plan that specified training and leadership processes but did not specifically mention that the school would follow the "Relay model" in implementing these goals.

WEST:

Plan Presented to Teachers: The plan voted on by teachers contained language stating that "in order to implement the International Leadership ACTION Zone … [the School District] is developing an Office of Autonomous Schools. This office, which will have oversight over both charter schools and the Zone schools, will be located within the Office of Accountability and Research." Rply. Ex. M and X. This identical language was contained in the plan submitted to the Boards.

Plan Presented to the Board: In addition to the language contained in the plan as voted on by the teachers at West, the plan submitted for approval to the Board of Education contained an additional reference to the role of the Office of Autonomous Schools stating that "Both the Office of Autonomous Schools and the individual ACTION Zone schools will have significant roles in managing the performance of the schools and the Zone." Rply, p.10, Ex.M.

Association's Objection: The Association argues that the "plan at [West] did not inform staff of the extent to which [the School District]'s Office of Autonomous Schools would be involved in day-to-day administration of that school." Rsp. p. 14-15.

Consideration of the Substantial Compliance Factors: (1) The Court does not see a non-compliance issue here. The plan voted on by the teachers clearly stated that there would be oversight by the Office of Autonomous Schools. The fact that this oversight was restated in a different section of the plan does not change that fact. (2) Even if the added reference to the Office of Autonomous Schools represents "non-compliance" the

Court finds that the School District fully informed the teachers as to the role of this office and therefore substantially achieved the purpose of the ISA. (3) To the extent that there was a failure to include the reference to the Office of Autonomous Schools throughout the plan, as presented to the teachers, the Court finds that this was at best an oversight and represents a good faith effort to comply with the ISA.

CENTRAL

Plan Presented to Teachers: The plan voted on by the teachers at Central provided that "School leadership … will determine the following year's school calendar … [that] Staff will have an opportunity to consent to calendar changes … [and that] *Pending calendar approval*, ACHS reserves the right to require additional teacher duty days … but [Staff] must consent to the increase in work days through the calendar vote process." (Emphasis added) Rply. Ex.U.

Plan Presented to Board: The plan, as presented to the Boards, contained nearly identical language, stating that "school leadership in collaboration with any delegated staff leadership committee, will determine the following year's school calendar … Staff will have an opportunity to consent to calendar changes prior to approval of the final calendar … ACHS reserves the right to require additional teacher duty days … Staff must consent to any increase in work days through the annual calendar vote process." Rply. Ex. K. This plan did not include the phrase *Pending calendar approval* before the statement about ACHS having the right to require additional teacher days. However, it is clear that teachers still must consent to the additional days during the calendar process.

Association's Objection: The Association seems to argue that the deleted phrase *Pending calendar approval* provides some additional support for the statement that "Staff must consent to any increase in work days through the annual calendar vote process."

Consideration of the Substantial Compliance Factors: The Court does not find the phrase (pending calendar approval) adds to any right the teachers have to approve the calendar. (1) The Court does not find that deleting the phrase "Pending calendar approval" changes the plan in any way, therefore there is no non-compliance with the ISA. (2) Even if deletion of this phrase constitutes non-compliance the missing phrase does not substantially change the plan. (3) The missing phrase appears to be a simple change in verbiage not effecting the meaning of the plan and therefore it is at worst an oversight and not a product of any intent to mislead. Based on a consideration of these factors the Court finds that the School District substantially complied with the ISA despite any changes from the plan voted on by the teachers and the plan presented to the Board.

PARIS

The Court finds that there is no basis on which it can conclude that there was any change from the plan voted on by the teachers at West and the plan submitted to the Board. The Association cannot point to any changes in the plan. At best, the Association asserts that the former principal, Tammy Stewart, made statements to the effect that the school's intent to make use of the Relay program was added to the plan after it was voted on by the teachers. However, at least one teacher who actually voted

on the plan would dispute this and would testify that Tammy Stewart discussed the Relay program with the teachers prior to the vote.

Without more the Court cannot find that there was some significant alteration in the plan voted on by the teachers and the plan submitted to the Board. To the extent that the Association could establish that reference to the Relay program was *added* to the plan submitted to the Board, the Court would apply the same analysis it did to the changes in the plans concerning Crawford. Thus, the Court finds the School District substantially complied with the requirements of the ISA.

III. Additional Defenses

Because the Court has found that the Association's claims should be dismissed because the claim is moot and has also determined dismissal is proper because there was substantial compliance with the ISA on the part of the School District because there were no material changes between the plans voted on by the teachers and the plans submitted for approval, it is not necessary for the Court to address the School Districts other arguments for dismissal. *Schultz v. Boston Stanton, 198 P3d 1253, 1254 (Colo. App. 2008).*

CONCLUSION

For the reasons set out more fully above, Defendant Adams-Arapahoe School District 28J's motion for summary judgment is GRANTED.

SO ORDERED THIS March 6, 2019.

BY THE COURT:

Elizabeth Beebe Volz
District Court Judge